

PROGRAM AND POLICY MEMORANDUM - LEGAL SERVICES #198-  
-PROTECTION AND SAFETY #3-98

October 16, 1998

TO: Protective Service Supervisors

FROM: Chris Hanus, Protection and Safety Division Administrator  
Michael J. Rumbaugh, Legal Counsel

RE: Guardianship As a Permanency Alternative

On June 23, 1998, the Nebraska Court of Appeals decided the case of *In Re Justin C.*, 7 Neb. App. 251 (1998). In this case, the Court held that there was no jurisdiction to establish a separate guardianship under the provisions of the Probate Code for children who are already under the custody and guardianship of the Department of Health and Human Services in a Juvenile Code proceeding. This ruling has caused quite a bit of consternation among all of us involved in the juvenile justice and child welfare system in the State of Nebraska. This is due in large part to the opinions of some people in the legal system that this ruling prohibits the county or separate juvenile courts from establishing a guardianship and removing HHS from the case. We are jointly issuing this memorandum in order to provide you with our latest and best thinking on how now to best approach the issue of recommending guardianship as the permanency alternative of choice in those cases where that appears to be in the best interests of the involved children.

We do not believe that the *Justin C.* case prohibits the establishment of guardianships in order to achieve permanency and to allow the Department to be removed from an ongoing case management role in those cases where sufficient stability exists and where adoption is not a viable option. We believe that there are two possible approaches either of which appear to adequately address the concerns expressed by the Court of Appeals in the *Justin C.* ruling. The alternatives we are suggesting are as follows and are being presented in our suggested order of preference:

1. A guardianship with appropriate foster parents or relatives could be established within the frame work of the existing Juvenile Code case by the court of jurisdiction entering an order of alternative disposition after a review hearing. We would need to submit an appropriately worded Case Plan and Court Report which proposes the alternative disposition of removal of the children from the care, custody and guardianship of the Department and directly place them in the care and custody and under the guardianship of the proposed guardians. The law clearly provides that this can be done. Nebraska Revised Statutes §43-284(3) (1997 Supp.) provides that a child or children may be committed to "the care of some reputable citizen of good moral character". The law also provides that when the court awards a juvenile of the care of a suitable individual that person shall, unless otherwise ordered, become a ward and be subject to the guardianship of that person. Nebraska Revised Statutes §43-285(l) (1996 Cum. Supp.). This option has the added advantage that should any problems develop within the guardianship, the court of jurisdiction could convene an immediate hearing and once again reinvolve the Department by committing the child or children to the Department under an appropriate court order.

We have talked to a number of judges and county attorneys and there appears to be some reasonable consensus building that this alternative is viable and may be the option of choice with regard to establishing these long term guardianships as the permanency alternative of choice.

2. The second option that appears to be available under the current state of the law is for a Probate Code guardianship proceeding to be filed in the county court or separate juvenile court of jurisdiction. A review hearing would be held in the Juvenile Code case immediately prior to a hearing under the Probate Code guardianship proceeding so that the county court sitting as juvenile court or the separate juvenile court could approve and adopt a Department Case Plan and Court Report recommending long term guardianship as the permanency alternative of choice in the best interests of the child or children. The court should then enter an order to that effect with detailed findings and remove the Department from further involvement in the Juvenile Code case. The court could then either dismiss the Juvenile Code case or maintain it in open status for the time being in order to have a vehicle within which to reinvolve the Department should there be problems developed within the guardianship that is proposed should problems develop. The court would then convene a hearing on the guardianship petition filed under the provisions of the Probate Code and the Department's Case Plan and Court Report regarding guardianship as the preferred permanency alternative as well as the court order from the Juvenile Code case approving such a Case Plan and Court Report should be offered and received into evidence at that hearing and then the court could order the guardianship at that time. By removing the Department before appointing a guardian under the Probate Code proceeding, it seems to us that the problem of conflicting jurisdictions and simultaneous guardians is avoided.

Under either of these alternatives, our ability to subsidize the guardianship remains in tact as long as the guardianship subsidy agreement is entered into prior to the removal of the child or children from the Department's custody.

It has come to our attention that some of the case managers may be using the terminology "dismiss the Department" or "dismiss the Department from the case" or some variation on that theme using the word "dismiss". We would strongly advise that we avoid using that term when referencing the concept of having the Department's ongoing case management role ended in a case where guardianship is the preferred permanency alternative. The term "dismiss" has certain legal connotations that can lead to misinterpretations and misunderstandings about what we are proposing in our case plans and court reports. Accordingly, we should avoid the use of that term and instead use terms like "remove the Department from custody and case management services" or "terminate the Department's current and ongoing involvement in the Juvenile Code case" or something like that, that avoids the use of the term "dismiss".

We believe strongly that long term guardianship remains a very viable permanency alternative that should be used in cases where adoption is not viable and where great stability has been achieved such that there is no apparent need for ongoing case management services by the Department. We urge you to share this memorandum with other professionals involved in your cases where you wish to propose guardianship as the permanency alternative of choice. Questions regarding our position and legal matters can be directed to either Mike Rumbaugh at (402) 471-9148 or Margaret Bitz at (402) 471-9457.